ATTORNEYS FOR APPELLANT:

ROBERT J. PALMER
JEFFREY A. JOHNSON
May Oberfell Lorber
Mishawaka, Indiana

ATTORNEYS FOR APPELLEE:

JOHN O. FEIGHNER
DUANE J. SNOW
Haller & Colvin, P.C.
Fort Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

ROGER BECHTOLD and DONALD LOEHER,	)	
Appellants-Plaintiffs,	)	
and	)	
VIRGINIA S. JAMES, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD E. JAMES,[1]	)	
vs.	)	No. 43A04-0602-CV-79
JOSEPH D. RUFFOLO, Special Master and RUFFOLO BENSON, LLC	)	
Appellee-Defendants	)	
and	)	
JABIN INDUSTRIES, INC.[2]	)	

[1] In the underlying action, this party and Jabin Industries, Inc., were co-defendants and Bechtold and Loeher were plaintiffs. However, James joined in Bechtold and Loeher's motion for summary judgment, the denial of which Bechtold and Loeher now appeal.

[2]This party is not an active party to this appeal.

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APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0304-PL-220

February 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Roger Bechtold and Donald Loehr appeal from the trial court's grant of summary judgment awarding Joseph D. Ruffolo and Ruffolo Benson, LLC (collectively, "Ruffolo") a $100,000 performance bonus pursuant to Ruffolo's sale of Jabin Industries, Inc. ("Jabin"), to Equity Capital Partners, LLC ("ECP"). Bechtold and Loehr raise three issues, which we consolidate and restate as (1) whether the unambiguous language of the sales agreement indicates that the cash held by Jabin is included in the purchase price; and (2) whether the trial court properly entered summary judgment in favor of Ruffolo. We conclude that the unambiguous language of the sales agreement supports the trial court's finding that Jabin's cash was part of the purchase price. However, we also conclude that genuine issues of material fact relating to the amount of Ruffolo's bonus preclude summary judgment, and we therefore reverse that part of the trial court's order.

Facts and Procedural History

On April 2, 2003, Bechtold and Loehr filed a complaint requesting that the trial court appoint a receiver to manage Jabin's corporate affairs. A hearing took place on May 5, 2003, at which point the trial court noted that the parties agreed that a custodian should be selected to manage Jabin's affairs, but that the parties had not yet agreed upon a custodian. On August 8, 2003, the parties filed a Stipulation for Appointment of a Special Master, indicating that they had agreed that Ruffolo should act as the special master and have the responsibility of marketing and selling Jabin. Also on August 8, the trial court issued an order describing the special master's scope of duties, responsibilities, and authority (the "Order"). Part of the Order indicates:

> [T]he Special Master is entitled to a Performance Bonus equal to the lesser of either:
> i. 20% of the gross sales price for the corporation's assets or stock in excess of $11 million, or
> ii. 20% of the gross sales price for the corporation's assets or stock in excess of the appraised value of Jabin Industries, Inc. as determined by a valuation which is to be prepared by RSM McGladrey, Inc., within 30 days of the appointment of the Special Master.

Appellant's Appendix at 25.[3] Ruffolo accepted this appointment on August 11, 2003, and on August 12, 2003, the trial court entered an order appointing Ruffolo.

Ruffolo successfully sold Jabin to ECP, pursuant to an Asset Purchase Agreement (the "Agreement"). Section 2.1 of the Agreement, "Purchase Price," states:

> The aggregate purchase price for the sale and purchase of the Assets (the "Purchase Price") shall be Eleven Million Eight Hundred Thousand and No/100 Dollars ($11,800,000), subject to adjustment after the Closing Date as set forth in Section 2.4 below, and shall be comprised of and paid or advanced

[3] Neither party disputes that (i) is the lesser, and therefore relevant, amount.

in accordance with the following:

> a. Eight Million Nine Hundred Fifty Thousand and No/100 Dollars ($8,950,000) shall be payable to the Seller at the Closing by the wire transfer of immediately available funds in such amount to an account or accounts to be designated by the Seller;
>
> b. Buyer shall assume (and accordingly receive credit against the Purchase Price for) up to Nine Hundred Seventy Five Thousand and No/100 Dollars ($975,000) of current liabilities as of the Closing Date, of the same type and nature, as set forth on the October 31, 2003 Financial Statements (the "Current Liabilities"), constituting the Assumed Liabilities.
>
> c. The Seller shall be entitled to distribute to the Seller's Shareholders cash held by the Company at Closing (which amount on October 31, 2003 was Six Hundred Twenty Five Thousand and No/100 Dollars ($625,000)); and
>
> d. The sum of Seven Hundred Fifty Thousand and No/100 Dollars ($750,000) shall be deposited by Buyer into escrow (together with the principal proceeds from the Original Escrow, defined below, the "Escrow"). In addition, proceeds from the original escrow, Five Hundred Thousand and No/100 Dollars ($500,000) (the "Original Escrow") (less accumulated interest which shall be paid out to Buyer) held by Three Rivers Title Company, Inc. ("Escrow Agent") pursuant to the escrow established upon execution of the letter agreement between Buyer and Seller executed January 20, 2004 (the "Letter of Intent") shall also be deposited into the Escrow and held under the Escrow Agreement, hereinafter defined. As described in the Escrow Agreement, One Million and No/100 Dollars ($1,000,000) of the Escrow shall be held until the Buyer and Seller agree on the Final Closing Date Balance Sheet. The remainder of the Escrow, Two Hundred Fifty Thousand and No/100 Dollars ($250,000) shall be held and disbursed in accordance with the term of the Escrow Agreement for a period of one (1) year.

Id. at 49.[4] The purchase price was later reduced by a $300,000 "Credit for Due Diligence."

[4] Section 2.1(d) was later amended to read:

> The sum of Seven Hundred Fifty Thousand and No/100 Dollars ($750,000) shall be deposited by Buyer into escrow (together with the principal proceeds from the Original Escrow, defined below, the "Escrow"). In addition, proceeds from the original escrow, Five Hundred Thousand and No/100 Dollars ($500,000) (the "Original Escrow") held by Three Rivers Title Company, Inc. ("Escrow Agent") pursuant to the escrow established upon execution of the letter agreement between Buyer and Seller executed January 20, 2004 (the "Letter of Intent") shall also be deposited into the Escrow and held under the Escrow Agreement, hereinafter defined."

Id. at 253.

On August 10, 2004, Ruffolo filed a Petition for Court Order Directing Payment of Performance Bonus to Special Master. On May 31, 2005, Bechtold and Loehr filed a motion for summary judgment requesting that the trial court deny Ruffolo's petition, arguing that Jabin's cash was not included in the purchase, and therefore the purchase price fell below the $11,000,000 threshold. Bechtold and Loehr supported their argument by citing section 1.2 of the Agreement, "Excluded Assets": "Buyer shall not purchase, and Seller shall retain, the following assets of Seller . . . all cash or cash equivalents." Id. at 47. On July 15, 2005, Ruffolo filed a cross-motion for summary judgment. On September 21, 2005, the trial court denied Bechtold and Loehr's motion and granted summary judgment in favor of Ruffolo. Bechtold and Loehr filed a Motion to Correct Errors, which the trial court denied on January 3, 2006. Bechtold and Loehr now appeal.

Discussion and Decision

I. Nature of the Case and Standard of Review

First, we must address the parties' disagreement as to the nature of this appeal. Ruffolo suggests in its brief that we should view the trial court's action as a decision to award costs, a decision that we review for an abuse of discretion. See Fort Wayne Lodge, LLC v. EBH Corp., 805 N.E.2d 876, 887 (Ind. Ct. App. 2004). However, although the trial court's decision resulted in the award of costs to Ruffolo, its decision remains a grant of Ruffolo's motion for summary judgment and a denial of Bechtold and Loehr's motion, and we will treat this appeal as one from a grant of summary judgment.

Id. at 186.

Summary judgment is appropriate when the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The trial court's grant of a motion for summary judgment comes to us cloaked with a presumption of validity. Rodriguez v. Tech Credit Union Corp., 824 N.E.2d 442, 446 (Ind. Ct. App. 2005). However, we review a trial court's grant of summary judgment de novo, construing all facts and making all reasonable inferences from the facts in favor of the non-moving party. Progressive Ins. Co. v. Bullock, 841 N.E.2d 238, 240 (Ind. Ct. App. 2006), trans. denied. We may affirm the trial court's grant of summary judgment upon any basis that the record supports. Rodriguez, 824 N.E.2d at 446.

Also, the parties disagree as to whether this case is a matter of contract interpretation. Ruffolo argues that this case does not lie in contract, and states, "[t]he dispute, however, relates to whether Special Master Ruffolo should be paid the Performance Bonus in accord with the trial court's August 8, 2003, Order." Appellee's Brief at 6. Ruffolo goes on to point out that it was not a party to the Order, but was merely a party appointed pursuant to the parties' request. We agree that in regard to the Order, the trial court was not bound by the normal rules regarding contract interpretation, as a trial court has the inherent power to clarify or interpret its own order. See Robinson v. Robinson, 858 N.E.2d 203, 205-06 (Ind. Ct. App. 2006) (dissolution court has power to interpret and clarify its decree, order, and settlement agreement); Eagle Motor Lines, Inc. v. Galloway, 426 N.E.2d 1322, 1327 (Ind. Ct. App. 1981) (trial courts given broad discretion in interpreting their own pre-trial orders). However, the Agreement was not a court order, but was a sales contract between ECP and Ruffolo, in its official capacity as special master. Therefore, in interpreting and applying the

Agreement, we will follow the general rules of contractual construction.

"Generally, the construction of the terms of a written contract is a question of law for which summary judgment is particularly appropriate." Orthodontic Affiliates, P.C. v. Long, 841 N.E.2d 219, 222 (Ind. Ct. App. 2006). However, summary judgment is not appropriate unless "the trial court has either determined as a matter of law that the contract is not ambiguous or uncertain, or that any ambiguity can be resolved without the aid of a factual determination." Id. Because the interpretation of a written contract is a question of law, we review the trial court's interpretation de novo. Id. When interpreting a contract, we will examine the contract as a whole to determine the parties' intent at the time of the contract's formation. "An interpretation of the contract that harmonizes its provisions is favored over one that causes the provisions to conflict." Id.

II. Jabin's Cash Assets

The trial court found that "[a]lthough the agreement is somewhat inconsistent, the court determines that the clear meaning of the agreement is that all of the assets of the Company were in fact sold to buyer pursuant to the bids submitted by the many parties interested in acquiring this Company and pursuant to the Kosciusko Circuit Court order authorizing acceptance of the highest and best bed [sic] for $11,800,000.00."[5] Appellant's App. at 17. The trial court also found:

> The court determines that the Asset Purchase Agreement as well as the closing statement and the undisputed affidavit of Joseph Ruffolo and affidavit of Todd Jacobs, Chief Financial Officer of Equity Investments, Inc., submit undisputed evidence that the $625,000.00 credit, or deduction, from the "aggregate", or

[5] As noted above, this purchase price was later reduced to $11,500,000.

> "gross purchase price", simply represents a method of payment rather than a reduction in the gross purchase price for all assets of the Company.

Id.

We agree with the trial court and conclude that the terms of the Agreement's section 2.1 lead inescapably to the conclusion that the cash retained by Jabin was considered part of the purchase price. To conclude otherwise would leave exactly $625,000, the amount of cash held by Jabin as of the execution of the Agreement, of the total aggregate purchase price unaccounted for:

$11,800,000 (aggregate purchase price)
- 8,950,000 (amount immediately payable by wire transfer)
- 975,000 (liabilities)
- 750,000 (amount to be deposited into escrow)
- 500,000 (original escrow)

625,000

We acknowledge that the Agreement also states in section 1.2 that ECP "shall not purchase, and Seller shall retain . . . all cash or cash equivalents," appellant's app. at 47, and that this statement is somewhat inconsistent with section 2.1. However, we agree with Ruffolo that the meaning of these two sections is that "the credit for cash retained by [Jabin] did not change the aggregate or gross purchase price of $11,800,000. Either ECP would pay the $625,000.00 cash price and receive the cash or [Jabin] would retain the cash and give ECP a credit." Appellee's Br. at 5. That is, section 1.2 indicates that ECP will not take possession of Jabin's cash, and section 2.1 indicates that this cash retained by Jabin is applied toward ECP's aggregate purchase price.[6]

[6] The Agreement contemplated distribution of the $625,000 cash retained to Jabin's shareholders.

To accept Bechtold and Loehr's argument would be to unnecessarily cause conflict between the Agreement's terms, something we do not do when a reasonable interpretation can be made that harmonizes the terms. See Simon Prop. Group, L.P. v. Mich. Sporting Goods Distrib., Inc. 837 N.E.2d 1058, 1074 (Ind. Ct. App. 2005), trans. denied. The language indicating that Jabin's cash is considered part of the purchase price comes in the section entitled "Purchase Price," specifically describing the purchase price's components. Cf. Magee v. Garry-Magee, 833 N.E.2d 1083, 1093 (Ind. Ct. App. 2005) (specific provision indicating that parties are to file joint tax return prevails over general provision regarding waiver of interest and preservation of parties' separate property). We conclude that the indication in section 1.2 of the Agreement that ECP shall not purchase Jabin's cash, when read in conjunction with section 2.1, means only that ECP shall not take possession of Jabin's cash, and does not conflict with the provision in section 2.1 indicating that the cash retained by Jabin is applied towards the purchase price. Cf. Design Indus., Inc. v. Cassano, 776 N.E.2d 398, 402 (Ind. Ct. App. 2002) (concluding that within context of the contract, the term "salary" applied to severance pay instead of compensation for work because to conclude otherwise would render severance payment provision meaningless).

Bechtold and Loehr also argue that summary judgment is not appropriate because the trial court considered extrinsic evidence in reaching its conclusion that Jabin's cash was part of the purchase price. We acknowledge that many of the trial court's findings discuss evidence extrinsic to the Agreement and the Order. However, we need not discuss whether the trial court properly considered this evidence, because we conclude that the terms of the Agreement, by themselves, unambiguously indicate that Jabin's cash was part of the

purchase price, and on this ground alone we affirm the trial court's grant of summary judgment as to the inclusion of Jabin's cash in the purchase price.

III. Amount of Ruffolo's Performance Bonus

Bechtold and Loehr also argue that even if Jabin's cash is considered part of the purchase price, genuine issues of material fact regarding the amount of Ruffolo's performance bonus preclude summary judgment. We agree.

We first note that the trial court based its grant of summary judgment on its conclusion that "gross sales price" as used in the Order equates to "aggregate purchase price" as used in the Agreement. Recognizing that trial courts have the inherent authority to interpret their own orders, we cannot say that the trial court erred in finding that "gross," as used in its order, is the same thing as "aggregate," as used in the Agreement. Although we acknowledge that "aggregate" and "gross" do not necessarily refer to same amount in all circumstances, the terms are also not mutually exclusive.

However, even if "aggregate purchase price" is the same as "gross sale price," evidence was not introduced from which the trial court could conclude what the aggregate price actually was. The Agreement states that the "aggregate purchase price . . . shall be [$11,800,000] subject to adjustment after the Closing Date as set forth in Section 2.4 . . . ." Appellant's App. at 49 (emphasis added). According to Section 2.4(b)

> If the Adjusted Working Capital, as reflected on the Closing Date Balance Sheet, is less than Five Million Sixty Five Thousand One Hundred Ninety One Dollars ($5,065,191.00), the Seller shall pay to Buyer the amount by which Adjusted Working Capital is less than Five Million Sixty Five Thousand One Hundred Ninety One Dollars ($5,065,191.00). If the Adjusted Working Capital, as reflected on the Closing Date Balance sheet, is more than Five Million Sixty Five Thousand One Hundred Ninety One and No/100 Dollars

($5,065,191), then Buyer shall pay to Seller the amount by which Adjusted Working Capital is more than Five Million Sixty Five Thousand One Hundred Ninety One and No/100 Dollars ($5,065,191).

Id. at 51. Section 2.4(d) states: "Any amount paid by Seller to Buyer pursuant to subsection (b) shall be deemed adjustment of the Purchase Price." Id. (emphasis added).

We "presume all provisions included in a contract are there for a purpose." Ind. Gaming Co., L.P. v. Blevins, 724 N.E.2d 274, 278 (Ind. Ct. App. 2000), trans. denied. Therefore, we must give these provisions meaning, and assume that the parties intended that any amount paid from Jabin to ECP affects the purchase price. The unambiguous language of these provisions indicates that the aggregate purchase price is not determined until any amount paid from Jabin to ECP is subtracted from the $11,800,000 figure. If the term "aggregate purchase price" is identical to "gross sales price," then the gross sales price can likewise not be determined before subtracting any amount paid from Jabin to ECP. Had the parties intended that the actual purchase price remain undisturbed and that any amount paid by Jabin to ECP be some sort of credit or deduction, it would not have been necessary to specifically designate such amount as an "adjustment" to the purchase price.[7]

At the time the trial court granted summary judgment, Ruffolo had not introduced any evidence of Jabin's Adjusted Working Capital or whether Jabin had paid any amount to ECP.[8] Therefore, the aggregate purchase price had not yet been established and summary

[7] We note that the parties agree that the "aggregate purchase price" was reduced by the due diligence credit. If the aggregate purchase price can be reduced by such a credit, which was not specifically referenced in the "Purchase Price" section of the Agreement, we fail to see why the aggregate purchase price should not also be reduced pursuant to section 2.4.

[8] We note that Section 2.4(d) does not indicate that any amount paid from ECP to Jabin would be considered an adjustment to the purchase price. Although we make no determination regarding this

judgment as to the amount of Ruffolo's performance bonus was inappropriate.

The lack of evidence introduced as to the aggregate purchase price requires a finder of fact to examine evidence not yet introduced and outside the four corners of the Agreement. See Francis v. Yates, 700 N.E.2d 504, 507 (Ind. Ct. App. 1998). Therefore, summary judgment was inappropriate, and we remand for a factual determination of the "aggregate sales price" and of the amount of Ruffolo's performance bonus.

Conclusion

We conclude that the unambiguous language of the Agreement indicates that Jabin's cash is considered part of the purchase price. However, we conclude that genuine issues of material fact exist as to the amount of Ruffolo's performance bonus.

Affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and BARNES, J., concur.

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omission, we note that it certainly casts doubt upon Ruffolo's contention that were ECP to pay Jabin pursuant to this clause, the purchase price would be adjusted upward. See Appellee's Brief at 27.